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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 100

ANTHONY PARSON, JR.,

Appellant.

20 Eagle Street
Albany, New York 12207
April 26, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Counsel.

2 MS. JESSEY: Good afternoon, Judge.

3 If I could have two minutes for rebuttal,
4 please.

5 CHIEF JUDGE DIFIORE: Certainly.

6 MS. JESSEY: If it pleases the court,
7 Deborah Jessey, Legal Aid of Buffalo, for Anthony
8 Parson, Jr.

9 My colleague agrees with me that defense counsel
10 advanced a two-prong strategy at the suppression hearing.
11 However, that two-prong strategy was unreasonable. The
12 adversarial process was denied appellant by the totality
13 of the representation, and counsel evinced a lack of
14 command of the law, and a misunderstanding of the facts.

15 JUDGE PIGOTT: Do you know - - - do you
16 know of any case where some defendant has been
17 convicted that it's because his lawyer failed him?
18 I'm being a little facetious, but I mean, things
19 happen in the course of a trial that - - - it
20 happened, and we're saying, well, the totality of the
21 circumstances that he got convicted and, you know,
22 they could have done a better job.

23 MS. JESSEY: Well - - -

24 JUDGE PIGOTT: I'm wondering where the
25 standard lies if we were to agree with you.

1 MS. JESSEY: Well, Judge. I think
2 certainly people get convicted, and when we look in
3 hindsight through the prism of - - - through the
4 prism of hindsight, we can look and say, well,
5 counsel could've done this, counsel could've done
6 that. And this court has said repeatedly, people are
7 not guaranteed a perfect trial; they are guaranteed a
8 fair trial. But in this case, the standard is
9 reasonableness. And it's whether or not a reasonably
10 competent attorney, in the same situation, would have
11 advanced the same process that this attorney
12 advanced.

13 JUDGE ABDUS-SALAAM: But what was
14 unreasonable about it, counsel? I'm trying to figure
15 that out.

16 MS. JESSEY: Well, the two - - -

17 JUDGE ABDUS-SALAAM: - - - and they asked
18 questions of the officers, and, you know, they seemed
19 to be pretty pointed questions about the windshield.
20 Don't you think that perhaps if they had asked more
21 questions, they would have, you know, maybe
22 undermined some of the vagueness of what the officer
23 was talking about?

24 MS. JESSEY: I don't think so, Judge. I
25 don't think that there was any possibility of greater

1 Hearing, that portion of the hearing started, it was
2 really incumbent upon defense counsel at that point
3 to enlarge and expand the record.

4 JUDGE STEIN: Is there anything in the
5 record that shows that there would have really been
6 any reasonable possibility of success in arguing for
7 suppression?

8 MS. JESSEY: Specific to the Ingle issue,
9 Judge?

10 JUDGE STEIN: Well, specific - - - specific
11 to the stop, yeah.

12 MS. JESSEY: We don't know. I mean, we can
13 only speculate. Maybe not, we don't know that; but
14 that's not the standard for this court. The standard
15 is whether or not the approach was reasonable.

16 JUDGE PIGOTT: I'm not sure that's true.

17 JUDGE STEIN: But I thought we need - - -
18 I'm sorry.

19 JUDGE PIGOTT: I apologize, Judge.

20 We're going to say, in every case with what
21 the defense lawyer did, was it reasonable or not, and
22 make our own subjective determination as to whether
23 it was? I can picture in this case, talking to your
24 - - - talking to your client if you're the defense
25 lawyer, and he's cooked.

1 I mean, he wants to say, you know, it's not
2 my coat, it is his coat. He wants to say, you know,
3 I - - - you know, I'm taking this position, and it's
4 not true. And he - - - and he - - - so he's left
5 with two deuces, and he's got a - - - he's got to do
6 the best he can for his client, and we're going to
7 say, well, because you didn't do more, the guy is in
8 - - - you know, we start all over again.

9 I just don't know where we interfere with
10 the attorney-client privilege, in terms of what the
11 attorney may have known.

12 MS. JESSEY: And if it were an attorney-
13 client privilege, and he interviewed his client, and
14 he got bad information, you're correct; he wouldn't
15 necessarily be ineffective. But in this situation,
16 where he just - - - he looked at the testimony that
17 came out of the direct, and he basically forfeited
18 the opportunity to enlarge the record, and get any
19 good information for his client.

20 JUDGE PIGOTT: What would you want to
21 enlarge it with? I mean, maybe what the officer said
22 was true.

23 MS. JESSEY: It could have been true. But
24 there could have been other truthful information that
25 would've helped his client. Specifically, he just

1 took the answers given on direct, and he turned them
2 into questions - - -

3 JUDGE PIGOTT: But when you say, could've -
4 - - could've - - -

5 MS. JESSEY: - - - guaranteeing - - -

6 JUDGE PIGOTT: I don't mean to pick on you,
7 but when you say, could have been helpful, we don't -
8 - - that's not our standard. We don't - - - we don't
9 look at the record and say, you know what, you know,
10 if we had a better defense lawyer here, you know, one
11 of the top ones, this case wouldn't have gone the way
12 it did. So obviously this guy is incompetent, you
13 know, he's ineffective vis-a-vis, you know, someone
14 else, and therefore we're going to reverse his
15 conviction.

16 MS. JESSEY: Well, that's not the only
17 issue in the case. If I could - - - if I can move
18 on. The 710.30 inculpatory statement, when that came
19 out during the - - - during the hearing, that was the
20 opportunity for defense counsel to object. Not just
21 to object, but to ask for preclusion, and excise that
22 statement from the People's case in chief. Yet,
23 counsel sat absolutely silent. He didn't - - -

24 JUDGE ABDUS-SALAAM: No, he didn't. He
25 said, Judge, that's only part of the statement. I

1 don't think that was all the 710.30. And - - - and
2 the - - - and I recall - - - as I recall, prosecutor
3 said, that's right. I have another witness; I'm
4 going to bring out some more 710.30 statements
5 through another witness.

6 MS. JESSEY: Judge, I think what happened -
7 - - first of all, it was at the end of the testimony;
8 he didn't say anything initially. He allowed that
9 information to come in, which then led to more
10 harmful information coming in, in that - - - then
11 there were a lot of questions about well, what did
12 you ask, what do you think you asked, what do you
13 remember.

14 JUDGE ABDUS-SALAAM: Would the 710.30 apply
15 in the suppression context, or is that preclusion at
16 trial?

17 MS. JESSEY: It's preclusion at trial,
18 Judge. But it certainly would have undercut the
19 defense's case at this point. And the suppression
20 hearing - - - of course, the goal is to suppress the
21 drugs, the inculpatory statement, and the gun, but it
22 also could have bolstered his position to perhaps get
23 a plea bargain. And maybe in this case, the only
24 plea bargain he was going to get, the only benefit he
25 would get, could be a sentencing commitment, but he

1 didn't even have that.

2 JUDGE STEIN: But how would it have
3 affected the trial though? I mean, there was no
4 charge of - - - of marijuana possession.

5 MS. JESSEY: Correct, it was a violation-
6 level amount.

7 JUDGE STEIN: Okay. But there was no - - -
8 he wasn't even charged with it. And - - - and the
9 police officer testified that he smelled burnt
10 marijuana. So even without the statement, wouldn't
11 that have given him probable reason to search the
12 vehicle?

13 MS. JESSEY: Well, that is what the
14 Appellate Division said, Your Honor. However - - -

15 JUDGE STEIN: Well, I'm asking you.

16 MS. JESSEY: Chestnut, which is not yet
17 stale, Chestnut tells us the original - - - the
18 original wording from Chestnut, when this court
19 issued a very short affirmance, was based on two
20 trained police officers. They were specifically
21 trained in the detection of narcotics by olfactory
22 senses; so they were trained in smelling marijuana.

23 In this case, there was no record evidence
24 that this officer had any training in that area.

25 JUDGE STEIN: Well, there was evidence, if

1 I'm not confusing another case, but he was an officer
2 for - - - he wasn't a brand new officer. He had been
3 an officer for eleven years; there was at least that
4 evidence, right?

5 MS. JESSEY: Eleven-and-a-half years; that
6 is what they said, Judge.

7 JUDGE STEIN: All right. So maybe it might
8 have been dangerous to ask questions about what his
9 experience was, because he may have elaborated and
10 shown himself to be eminently expert in detecting the
11 smell of marijuana.

12 MS. JESSEY: He could have, Judge, but that
13 wouldn't have left this person, my client, in any
14 worst harm. When the court ultimately - - - when the
15 court ultimately - - - distracted by my light, I'm
16 sorry. When the court ultimately issued their
17 decision at the end of the suppression hearing, the
18 judge actually wove that information into the
19 reasoning.

20 The fact that the officer approached, he
21 rolled down his window, he smelled marijuana, he
22 asked him, there was an inculpatory statement; so it
23 was harmful, there was prejudice, Judge.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 Counsel.

1 MS. LOWRY: Good afternoon, Your Honors.
2 Ashley Lowry on behalf of the People.

3 In light of the proper police conduct in this
4 case, where defense counsel presented two rational
5 theories for suppression, both ultimately unsuccessful, he
6 is not ineffective; that is not the standard that this
7 court has upheld. My opponent asks this court to
8 speculate that a more vigorous cross examination of this
9 particular witness would have undermined his credibility,
10 and that is simply not the standard.

11 This is not a clear cut dispositive Turner
12 error, this is not a situation where any, you know,
13 particular question, or error, or omission on behalf of
14 counsel would have changed the outcome of the proceedings
15 here. And we have proper police procedure from start to
16 finish. Here, the police had probable cause based on two
17 separate - - -

18 JUDGE PIGOTT: Well, I think - - - I think
19 that dissent in the Fourth Department were picking -
20 - - were pointing out more of what the defense didn't
21 do, then what the - - - how the police testified. I
22 think Judge Fahey was pointing out that there was
23 just total deficient - - - he could think of, I think
24 in a short period of time, a number of questions that
25 were obvious that should have been asked that would

1 have led to, perhaps as counsel is saying, you know,
2 a suppression.

3 MS. LOWRY: Well, first of all, that is all
4 speculation. We do not know what the outcome was.
5 However, defense counsel did cross examine where
6 there was something to cross examine about. They did
7 ask about the reasons for the stop, he did ask about
8 the police officer's ability to see the violations,
9 especially considered the lighting conditions, the
10 speed of defendant's vehicle, the direction of travel
11 of his vehicle; based upon those positive responses
12 of proper police conduct, defense counsel tried to
13 minimize the damage of that, and still make that
14 argument.

15 JUDGE STEIN: Did his questions add
16 anything that the direct testimony didn't already
17 state?

18 MS. LOWRY: It did expand - - - it did
19 expand slightly, however, when he realized that the
20 police officer was not getting caught up in his cross
21 examination, he was not, you know, undermining that
22 credibility. You know, he directed his questions; he
23 took his questions in a different direction.

24 JUDGE ABDUS-SALAAM: You seem to be
25 suggesting, counsel, that this lawyer did the minimum

1 to avoid being ineffective. So where - - - you know,
2 where do we draw the line if it's, you know, how do
3 we decide what's the bare minimum and what's not?

4 MS. LOWRY: You know, this particular
5 defense attorney represented the defendant from start
6 to finish. You know, he was there making bail
7 motions, he did, you know, provide motion papers, he
8 did make the request, he did, you know, provide two
9 rational theories for suppression. You know, he
10 fully litigated the voluntariness of the statements,
11 as well as the circumstances surrounding the stop.

12 You know, he did what he could within the
13 facts of this case. And then at sentencing, when
14 defendant did ultimately decide to plead guilty, he
15 received - - - you know, he argued on behalf of the
16 defendant, he received the minimum incarceration, he
17 received the minimum post-release supervision. So I
18 would say, this counsel, I mean, based on this
19 record, is more than effective.

20 You know, it's a matter of fair, you know,
21 fair suppression hearing, it's a matter of meaningful
22 representation, you know, did the defendant receive a
23 fair hearing.

24 JUDGE ABDUS-SALAAM: Speaking of the
25 fairness, why didn't the People give 710.30 notice on

1 all the statements?

2 MS. LOWRY: Obviously, it would have been
3 better practice to have included that particular
4 statement, however, the remedy would have been
5 preclusion of its use at trial, not it's - - - you
6 know, not our introducing the statement for purposes
7 of the probable cause analysis at the suppression
8 hearing.

9 The officer's testimony of his personal
10 observation of the smell of marijuana, that would
11 still be allowed. It would be only this - - - his
12 statement that would have been precluded at trial.
13 So it really wouldn't have changed the outcome.

14 Unless the court has any other questions.

15 CHIEF JUDGE DIFIORE: Thank you.

16 MS. LOWRY: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MS. JESSEY: Counsel's errors and omissions
19 couldn't have been strategic. The fact that he
20 didn't object to the unnoticed inculpatory statement,
21 there is simply no excuse for that. It would have
22 minimally drawn the court's attention to the fact
23 that this veteran officer was offering testimony at
24 the suppression hearing that conflicted with his
25 written record evidence in the case.

1 JUDGE PIGOTT: I don't - - - I don't
2 disagree with you. One of the things I look at, I
3 mean, I'm sure you've seen it more often than I have,
4 where defense counsel is just kind of walking through
5 the, you know, just going through the motions, mainly
6 because they know these - - - the client's goose is
7 cooked. But you still, you know, want to do that.

8 Is - - - is that what this argument boils
9 down to, is that he, you know, he didn't get deeply
10 enough into the case?

11 MS. JESSEY: I don't think he was alert; he
12 wasn't paying attention. As soon as that statement
13 come out - - - came out, any reasonable attorney
14 would be set afire. I can picture the typical
15 courtroom where somebody stands up and makes a lot of
16 noise. And even though the remedy is preclusion from
17 the case in chief - - -

18 JUDGE PIGOTT: Not a bad remedy.

19 MS. JESSEY: - - - it certainly would have
20 alerted the court to the fact that there was some
21 conflict in the case. And perhaps it would have
22 undermined the credibility of the testifying officer.

23 Additionally, another piece of counsel's
24 argument that was in - - -

25 CHIEF JUDGE DIFIIORE: And the conflict that

1 would have undermined the credibility of the officer,
2 I'm not all following that point.

3 MS. JESSEY: The fact that he didn't
4 document the seven - - - the inculpatory statement.
5 There was no written documentation of that, but yet
6 he chose to testify to that at the suppression
7 hearing. The record didn't match the testimony.

8 Additionally, counsel did make an argument that
9 this was a pretextual traffic stop. And as we know, this
10 court instructed in Robinson, that pretextual stops are
11 lawful if they're supported by probable cause to believe
12 that a motorist violated the vehicle and traffic law. So
13 that was a misapprehension of the law.

14 We're just asking this court to consider that
15 Mr. Parson did not receive the effective assistance of
16 counsel to which he was entitled, and therefore he was
17 denied a fair adversarial process.

18 JUDGE PIGOTT: Thank you.

19 CHIEF JUDGE DIFIORE: Thank you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Parson, Jr., No. 100 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: April 27, 2016

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